DAVID C. LEE #193743
ILSE C. SCOTT #233433
FITZGERALD ABBOTT & BEARDSLEY LLP
1221 Broadway, 21st Floor
Oakland, California 94612
Telephone: (510) 451-3300
Facsimile: (510) 451-1527
Email: dlee@fablaw.com; iscott@fablaw.com

Attorneys for Defendants Inder Dosanjh and California Automotive Retailing Group, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - OAKLAND

GROTH-HILL LAND COMPANY, LLC, a California limited liability company; ROBIN HILL, an individual a/k/a Robin Groth a/k/a Robin Groth-Hill; JOSEPH HILL, an individual; and CROWN CHEVROLET, a California corporation, Plaintiffs, vs. GENERAL MOTORS, LLC, a Delaware limited liability company; ALL Y FINANCIAL INC., a Delaware corporation who is the successor-in-interest to GMAC Inc., GMAC Financial Services LLC, GMAC LLC and General Motors Acceptance Corporation; RANDY PARKER, an individual; JAMES GENTRY, an individual; KEVIN WRATE, an individual; INDER DOSANJH, an individual; CALIFORNIA AUTOMOTIVE RETAILING GROUP, INC., a Delaware Corporation; and DOES 1 through 25, inclusive, Defendants	Case No.: C 13-1362 TEH **INDER DOSANJH AND CALIFORNIA AUTOMOTIVE RETAILING GROUP, INC.'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT** **[F.R.C.P. 9(b), 12(b)(6)]** Date of Hearing: May 20, 2013 Time: 10:00 a.m. Judge: Hon. Thelton E. Henderson Location: Courtroom 2

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Defendants California Automotive Retailing Group, Inc. ("CARG") and Inder Dosanjh ("Dosanjh") (collectively, "CARG Defendants") submit this reply in support of their motion to dismiss Plaintiffs' First Amended Complaint as it fails to state a claim upon which relief may be granted as follows:

I. LEGAL ARGUMENT

A complaint must be dismissed when it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). As amplified by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to survive a motion to dismiss the plaintiff must allege specific and plausible facts sufficient to support the claim. As the Ninth Circuit has held, *Twombly* and *Iqbal* require district courts to reject at the pleading stage conclusory allegations which do not rise above the speculative level and do not state a claim which is "plausible on its face." *Moss v. U.S. Secret Serv*., 572 F.3d 962, 972 (9th Cir. 2009) . *See, e.g., In re Cutera Sec. Litig.*, 610 F.3d 1103, 1107 (9th Cir. 2010) (a claim is "properly dismissed if it fails to plead enough facts to state a claim for relief that is plausible on its face.") (quoting *Twombly*, 550 U.S. at 570).

As amply set forth in CARG Defendants' moving papers, Plaintiffs' First Amended Complaint ("FAC") falls short of the pleading requirements enunciated above.

A. Plaintiffs' Fifth and Sixth Cause of Action Against CARG Defendants for Conspiracy to Defraud and Conceal Facts Fail

Plaintiffs' Fifth and Sixth Causes of Action (for false promise and concealment), in spite of their Opposition, remain incurably deficient as against the CARG Defendants. As pled, Plaintiffs' fraud claims specifically arise from alleged false promises and concealments by Defendants Ally Financial ("Ally") and Kevin Wrate ("Wrate") that induced Plaintiffs to: (1) offer personal guaranties for GBC's debts; (2) pledge real property as security for GBC's debts; and (3) sell the security and give to Ally the sales proceeds in satisfaction of GBC's debts. (FAC, ¶¶132, 156.)

Plaintiffs allege no facts demonstrating that CARG Defendants actually made any false promises or representations to Plaintiffs. Instead, the only allegations in the FAC tethering

CARG Defendants to these fraud claims are their alleged "awareness" of and "agreement" that such false promises and concealments should occur (FAC, at ¶¶148 and 164). Consequently, Plaintiffs allege that CARG Defendants are "co-conspirators" in Ally's plan to defraud Plaintiffs and conceal facts.

1. Plaintiffs' Conspiracy To Defraud Claims Fail If The Underlying "Fraud" Is Not Actionable

Because conspiracy is a "borrowing" claim, "[s]tanding alone, [it] does no harm and engenders no tort liability. It must be activated by the commission of an actual tort." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 511 (1994). See also, *Lyons v. Security Pac. Nat'l Bank*, 40 Cal.App.4th 1001, 1019 (1995) ("No cause of action for conspiracy can exist unless the pleaded facts show something was done which, without the conspiracy, would give rise to a right of action.") (internal quotations and citations omitted). Therefore, if the underlying "tort" is not actionable, the conspiracy claim fails.

For the reasons asserted in Ally's motion to dismiss (a motion that CARG Defendants join, the arguments of which are adopted and incorporated in this motion), the so-called "fraud" on which the instant conspiracy claim is predicated are not actionable as a matter of law. For this reason alone, Plaintiffs' conspiracy claim against CARG Defendants fails.

2. The "Conspiracy" Allegations Are Insufficient In Any Event

Even if the underlying fraud claims against Defendants Ally Financial ("Ally") and Kevin Wrate survive, the conspiracy claims against CARG Defendants fail.

California law squarely holds that mere "awareness" or "knowledge" of a scheme does not create conspirator liability. "[A]ctual knowledge of the planned tort, without more, is insufficient to serve as the basis for a conspiracy claim." *Kidron v. Movie Acquisition Corp.*, 40 Cal.App.4th 1571, 1582 (1995). Rather, knowledge plus facts establishing an "intent to aid in its commission" of the fraud is necessary. *Id.* ("The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective and their intent to aid in achieving that objective.") Because "[m]ere association does not make a conspiracy" there must be "evidence of some participation or interest in the commission of the offense." *Davis v. Superior Court*, 175 Cal.App.2d 8, 23 (1959).

Plaintiffs' Opposition conspicuously fails to cite to any legal authority holding otherwise. Instead, Plaintiffs, in blatant disregard to the "particularity" pleading requirement for fraud claims (codified by Rule 9(b)), claim that they are not obligated to plead specific facts beyond CARG Defendants' knowledge or awareness, but instead are only required to plead a "short, plain, simple, concise and direct statement" (Opposition, at 25:17-19): "Rule 9(b)'s particularity requirement does not abrogate Rule 8's general requirements that a pleading contain a short and plain statement of the claim…[and thus]…a plaintiff only need provide a short plain statement of each claim…" and "all that is required -- indeed, all that is allowed -- is a short, plain, simple, concise and direct statement , as is reasonable under the circumstances." (Opposition, at 25:16-19.) Plaintiffs cite to *Carrigan v. California State Legislature*, 263 F.2d 560, 565 (9th Cir. 1959) as support.

The inanity of that proposition is multi-layered. First, the suggestion that *Carrigan* endorses the view that the "particularity" requirement of Rule 9(b) is subordinate to the general pleading requirements of Rule 8 is a gross overstatement of that case. At best, *Carrigan* acknowledges the intersection between Rule 8 and Rule 9(b), and concludes that while a claim of fraud requires particularized facts, the allegations may be pled shortly, concisely, or plainly, so long as the requisite degree of "particularity" is achieved. In no way does *Carrigan* obviate the requirements imposed by Rule 9(b).

Second, Plaintiffs' argument also ignores the bevy of contrary case law cited in CARG Defendants' moving papers (see Section III(C)(2)) establishing that in the Ninth Circuit that "Rule 9(b) requires particularized allegations of the circumstances constituting fraud" and that "[t]o allege fraud with particularity, a plaintiff must set forth more than the neutral facts necessary to identify the transaction…." *In re GlenFed, Inc. Securities Litigation*, 42 F.3d 1541, 1547-48 (9^{th} Cir. 1994). More specifically, "[t]his circuit has found that the plaintiff must include statements concerning the time, place, and nature of the alleged fraudulent activities and that 'mere conclusory allegations of fraud are insufficient.'" *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F.Supp. 1365, 1374 (D. Haw 1995).

Regardless, the primary defect in Plaintiffs' pleading centers not on the fact that the allegations tying CARG Defendants to Ally's and Wrate's alleged conspiracy to defraud are inadequately plain or concise (which they are), but on the fact that they are generally nonexistent. Plaintiffs allege no facts -- plainly, concisely, shortly or otherwise -- establishing CARG Defendants' participation in the alleged conspiracy to defraud (i.e., Ally's and Wrate's false promises and concealments) beyond their mere awareness or knowledge of that plan. Plaintiffs' allegation that Dosanjh was "observed" having telephone calls with Wrate addressing Ally's plan to exert financial pressure on GBC to "put it out of business" merely evidences further "knowledge" of the plan. There are no facts establishing that CARG Defendants intended "to aid in [the] commission" of Ally's and Wrate's false promises and concealment. *Kidron*, 40 Cal.App.4th at 1582. Instead, the allegations evidence nothing more than knowledge of the plan without any affirmative participation by CARG Defendants. Such pleading falls far short of the standards imposed under *Twombly* and *Iqbal*, and the particularity requirements of Rule 9(b).

Plaintiffs highlight other alleged "wrongful" conduct by CARG Defendants, including:

- Providing "Parker and Gentry [with] illicit kickbacks" (FAC, ¶27);
- Providing "Parker with free accommodations and entertainment in Hawaii and other cities throughout the United States, [paying] for his cell phone, [taking] him on a free trip to New York on a private jet, and [giving] one of his girlfriends a free car." (FAC, ¶27);
- Giving "Gentry with a high paying job at CARG as Chief Operating Officer." (FAC, ¶27);
- Discussing "with Wrate how Ally was going to apply financial pressure to GBC to put it out of business."; (FAC, ¶57) and
- "[P]ersonally [targeting] Robin Hill in the conspiracy, claiming, 'I'm going to put that cunt [Robin Hill] out of business, and GM is

/ / /

going to help me do it." (FAC, ¶27) (See, Opposition, at 26:12-27:14.)[1]

However, the above allegations also are insufficient. First, that conduct is self-evidently directed at GBC (with the goal of putting it out of business), and not at Plaintiffs. It is therefore disconnected from a claim that CARG Defendants conspired to defraud Plaintiffs in their individual capacities. Second, as addressed in detail below, because such harm is directed at GBC -- a separate corporate entity -- Plaintiffs lack standing to pursue a claim for harm directed at GBC in any event. *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 439-40 & nn. 12, 13 (9th Cir. 1979) (officers and shareholders have no standing to sue on corporation's legal claims). For this reason alone, Plaintiffs have no standing to assert such claims in any event, even if CARG Defendants acted in the manner as alleged.

3. Plaintiffs' Conspiracy to Fraudulently Conceal Facts Is Insupportable As A Matter Of Law

Plaintiffs' concealment claim sits atop even faultier allegations, i.e., that defendants "concealed the fact that they…had devised a conspiracy… to force Groth Bros. Chevrolet out of business…." (FAC at ¶153.) Plaintiffs cannot and have not presented any case law upsetting the precept that a defendant has no duty to disclose to or warn plaintiff about an intent to commit a wrongful act against them. *Bank of America Corp. v. Superior Court*, 198 Cal.App.4th 862, 872 (2011) ("The general duty is not to warn of the intent to commit wrongful acts, but to refrain from committing them. *We are aware of no authority supporting the imposition of additional liability on an intentional tortfeasor for failing to disclose his or her tortious intent before committing a tort.*"), quoting *LiMandri v. Judkins*, 52 Cal.App.4th 326, 338 (1997) (emphasis in original). "Although 'inferentially, everyone has a duty to refrain

[1] Plaintiffs' zeal in referencing through their Opposition, at every opportunity, Dosanjh's alleged use of the "c-word" is transparently designed to shock the Court by the offensiveness of the word itself. Offensiveness aside, however, the utterance of that term adds nothing to the conspiracy analysis. First, as Ms. Hill is not actually "in business," the statement itself reflects that the "target" of Dosanjh's intent, at best, is GBC -- the business merely employing Ms. Hill. Second, the alleged statement tellingly exists in isolation -- there are simply no supporting facts identifying when Dosanjh allegedly made the statement, to whom it was made, or the identity of the person purportedly witnessing the statement; a clear deficiency under the pleading requirements of Rule 9(b).

from committing intentionally tortious conduct against another' [citation], it does not follow that one who intends to commit a tort owes a duty to disclose that intention to his or her intended victim." *Id*. ("'rather circular' to say that…Defendants 'committed fraud by concealing their intent to commit fraud.'"), quoting *In re MRU Holdings Securities Litig.*, 769 F.Supp.2d 500, 515 (S.D.N.Y. 2011)).

Rather than citing to any law, Plaintiffs merely attempt to distinguish *Bank of America* by arguing that in this case, Defendants sought to conceal "important material facts" (i.e., their intent to drive Plaintiffs out of business, and force a sale of the dealerships to Dosanjh), rather than a general intent to commit a tort ("intent to defraud investors" (Opposition, at 8:11-22)). This is a distinction without a difference: the "concealed" information consists solely of Defendants' alleged "intent" to harm GBC regardless of whether that harm is visited upon GBC via false promises or other wrongful tortious conduct. CARG Defendants owed no duty to Plaintiffs to disclose Ally's or Wrate's alleged plan, even if they possessed knowledge of such a plan (which they did not). Therefore, Plaintiffs' claim that CARG Defendants are liable for conspiracy to fraudulently conceal facts fails as a matter of law.

B. Plaintiffs' RICO Claim Fails

1. Plaintiffs' Lack Standing To Assert RICO Claims Because Their Alleged Injuries Are Derivative In Nature, Not Direct

Plaintiffs' assertion that they have standing to assert their RICO claims because the alleged harm constitutes a "direct injury" is flatly incorrect, and contrary to the law of this Circuit. It is the general rule that an individual harmed by injury to a corporation in which she holds an interest has no standing to sue individually for an injury to the corporation. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). This is because in such an instance, the individual plaintiff has suffered "derivative" injury (which may "redressed only through litigation in the name of the corporation") versus "direct" injury (which "may be redressed through independent suit"). *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago*, 877 F.2d 1333, 1335 (7th Cir. 1989).

Where (as here) plaintiffs are guarantors of a corporation's debts, and the security pledged by plaintiffs is used to satisfy those corporate debts, plaintiffs lack standing to assert a RICO claim. "It is also generally accepted that guarantors of a corporation's debt, even if those guarantors are also stockholders, do not have standing to bring an action if the only harm suffered is derivative of the harm to the corporation." *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F. Supp. 1365, 1380 (D. Haw. 1995) (emphasis supplied).

The rationale for this rule -- harsh as it might appear -- is that guarantors to corporate debt are, in effect, creditors in waiting. As explained by Judge Easterbrook, in *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago,* 877 F.2d 1333, 1336 (7th Cir. 1989):

> Guarantors are contingent creditors. If the [corporation] stiffs a creditor, that creditor can collect from the guarantor; the guarantor succeeds to the original creditor's claim against the [corporation]. We know that creditors cannot recover directly for injury inflicted on a firm, so guarantors as potential creditors likewise cannot recover.

Therefore, although:

> "[o]ne could say that guarantors are different [than other creditors] because they may deal directly with the wrongdoer…direct dealing is not the same as direct injury. … There is therefore no reason other than a semantic one to treat guarantors differently from debt investors in the firm, and semantics (even if glorified as semiotics or hermeneutics) is not good enough."

Mid-State Fertilizer, 877 F.2d at 1336.

The rule persists despite individual plaintiffs having "risked their wealth, including their house, through their guarantees of the corporate debt…" and "[e]ven though [plaintiffs] allege that they were misled into guaranteeing the loans…." *Lui Ciro, Inc.*, 895 F. Supp. at 1379, 1381 (emphasis supplied). "While this may seem a harsh result, it is the risk undertaken by any investor in a corporation." *Id.* (emphasis supplied).

To properly assert a RICO claim, plaintiffs must show that the violation is both the "but for" cause of the plaintiff's injuries and the proximate cause. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). Where the harm to individual plaintiffs is dependent on the corporation's ability to pay back the loans, there is "no direct harm on the [individual plaintiffs], who are in the category of investors…and guarantors of notes…." *Id.* at 1381 (emphasis supplied). Put another way, in the context of proximate cause, "[t]he failure of [defendant corporation] to honor its obligations under the loans is not itself a predicate act or unlawful activity. Therefore, the defaults are intervening causes, removing the fraud from the category of primary or proximate cause." *Id.* at 1379 (emphasis supplied). Thus, the allegations of fraud in inducing the individuals to enter into various agreements and to guarantee loans "have not proximately caused injury … under the definitions of causation and injury under RICO." *Id.* at 1379-80.

Here, the result can be no different. In a feeble case of denial, Plaintiffs characterize their losses as "individual damages" rather than derivative in nature, and identify those damages as follows:

- "being forced to provide Ally with a first position deed of trust on their $3.1 million property";
- "sell their property at a substantial loss"; and
- "give all the proceeds from the sale to Ally." (Opposition, at 16:26-17:2.)

Whether "forced" or "misled" (*Lui Ciro, Inc.*, at 1379), Plaintiffs' unambiguous allegations establish that they "gave Ally a First Deed of Trust on their new property and executed [a] Secured Guaranty in favor of Ally" and that these personal guaranties were "in favor of Ally covering all of the dealership's debt." (FAC, ¶¶50-52, emphasis supplied.) When GBC subsequently defaulted on its debt to Ally, "[Plaintiff] Robin Hill [as guarantor to GBC's debts] then asked Kevin Wrate if she could sell the property and pay Ally the amount it was then demanding from the proceeds." (FAC, ¶54.)

As pled, Plaintiffs' injuries are clearly derivative in nature: Defendants' alleged fraudulent acts in exerting financial pressure on GBC caused GBC to default on its loans with Ally (the direct injury), and only after GBC's default, were Plaintiffs, as guarantors, forced to sell the security (real property) to pay those corporate debts that GBC had defaulted on (the derivative injury). Therefore, GBC's "defaults are intervening causes, removing [Defendants'] fraud from the category of primary or proximate cause" and consequently, "it is [GBC], then, that bears any injury created by its entry into the…agreements [with Ally], leaving the individual [Groth Plaintiffs], without standing to sue under RICO." *Lui Ciro, Inc.*, at 1379,

1381. *See, e.g., Sparling v. Hoffman Construction Co.*, 864 F.2d 635, 640-41 (9th Cir. 1988) (holding corporate shareholders and guarantors of corporate bonds lacked standing to assert RICO claims, and noting that "Those circuits that have considered the issue … are unanimous in holding there is no shareholder standing to assert RICO claims where the harm is derivative of harm to the corporation."); *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418-21 (9th Cir. 1995) (depositors in a bank allegedly damaged by RICO violations lacked standing because they were creditors of the bank, and their injuries were derivative of injury to the corporation); *Manson v Stacescu*, 11 F.3d 1127, 1130 (2d Cir. 1993) ("Creditors of a bankrupt corporation…generally do not have standing under RICO...The creditor's injury is derivative of that of the corporation and is not caused proximately by the RICO violations." (citation omitted)).

Plaintiffs attempt to forge a distinction between this action and the numerous cases cited above, including notably, *Lui Ciro, Inc.*, by arguing that their damages are "individualized" because "the harms alleged would have been suffered by the Groth Plaintiffs regardless of whether GBC suffered any damages." (Opposition, at 18:5-7.) Conspicuously, Plaintiffs cite no legal authority supporting their position or contradicting that cited by CARG Defendants. Further, and equally significant, Plaintiffs' argument is fallacious: had GBC "thrived" (as hypothecated by Plaintiffs) and not defaulted on its debts to Ally, Plaintiffs' guaranties would never have been triggered, the security they pledged (the real property) would not have been sold, and the proceeds from that sale would not have been paid to Ally in satisfaction of GBC's debts. As in *Lui Ciro, Inc.*, Plaintiffs' "risk depend[ed] on the success of [GBC] in its agreements with [Ally] and [its] ability to pay back the loans." *Lui Ciro, Inc.*, at 1381.

2. Plaintiffs' Predicate Act (Mail Fraud) Is Not Plead With The Required Particularity

Even if, in the unlikely event, Plaintiffs establish that they have standing, the RICO claim is insufficiently pled. While the FAC alleges that "Defendants" sent no less than "17 letters" and "24 emails" to Plaintiffs to "carry out their scheme to defraud" and further itemize each mailing by referencing their respective dates, authors and recipients (FAC, ¶173-174.), it omits allegations particularizing the contents of the mailings or establishing the manner in which they aided in the alleged fraud on Plaintiffs.

Plaintiffs justify their scant allegations by arguing that "the Groth Plaintiffs need not plead fraudulent content of the mailings and wires sent, they need only allege that the mailings and wires were used in furtherance of the racketeering scheme." (Opposition, at 29:28-30:5, citing, *Schmuck v. U.S.*, 489 U.S. 705 (no pincite provided) (1989).) Plaintiffs' reliance on *Schmuck* is overstated. First, the case, a criminal action, concerns the evidentiary elements of mail fraud, and therefore is silent on the requisite pleading requirements imposed by Rules 8 or 9(b). Plaintiffs cite to no legal authority contradicting the holdings of those civil RICO cases wherein it is held that Rule 9(b) imposes on Plaintiffs the obligation to include allegations of who said what, to whom, when, where, and in what context. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged."); *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, at 1065-66 (9th Cir. 2004) (affirming dismissal of civil RICO claim based upon predicate acts of mail fraud for failure to plead with particularity); *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989) (same).

As clearly articulated in this Circuit, a plaintiff must explain why a statement is false or misleading. *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1106-07 (9th Cir. 2003)); see also *Mostowfi v. i2 Telecom Intern., Inc.*, 269 Fed.Appx. 621, 624 (9th Cir. 2008) ("a complaint must set forth an explanation as to why the statement or omission complained of was false or misleading", internal quotations omitted).

Second, while *Schmuck*, in the context of a criminal action, does cite to case law supporting the proposition that the use of mail "need not be an essential element of the scheme," it acknowledges that such mailings must be "incident to an essential element of the scheme" or "a step in [the] plot." *Schmuck*, 489 U.S., at 710-711. The FAC utterly fails to state facts establishing how the mailings actually are connected to the "plot" or incidental to the scheme. In the absence of such facts, the ability to discern how and whether a viable "predicate act" exists to support the RICO claim is impossible. As *Schmuck* itself recognizes, if "the scheme…had reached fruition" notwithstanding the mailings, then those mailings are "immaterial…to any consummation of the scheme" and therefore no mail fraud violation occurs. *Id., at 723,* citing to *Kann v. United States*, 323 U.S. 88, 94 (1944).

Finally, Plaintiffs glaringly ignore CARG Defendants' argument that the FAC fails to state with any particularity how they are connected with the alleged mail fraud. None of the mailings listed in the FAC reflect that CARG Defendants authored or transmitted them. The failure to do so warrants dismissal of the RICO claim as against the CARG Defendants because there is no articulation of their role in the predicate act. *Izenberg v. ETS Servs.,* 589 F. Supp. 2d 1193, 1204 (CD. Cal. 2008) (dismissing mail and wire fraud predicate act in the absence of "specific content of any alleged misrepresentations" and failure to "precisely define the role of each defendant in the fraud") (emphasis supplied).

C. Plaintiffs Intentional Infliction of Emotional Distress Claim Fails

In an attempt to salvage her intentional infliction of emotion distress ("IIED") claim, Plaintiff Hill argues that the Defendants' actions against her were "direct" and "outrageous" and resulted in "severe" distress. Notably, she fails to support such assertions with any compelling law.

Christensen v. Superior Court, 54 Cal.3d 868 (1991) unequivocally holds that a claim for IIED requires aggravating conduct that is "directed at the plaintiff." Accordingly, Ms. Hill argues that she was personally targeted, as evidenced by Dosanjh's alleged statement that he wished to put "that cunt out of business." (Opposition, at 31:27-32:3.) Drawing on that allegation (repeatedly), she concludes that CARG Defendants' actions "were clearly directed" at her. Such an assertion is form over substance. The comment, even if said, is clearly directed at GBC, because Ms. Hill, herself, was "not in business" -- she was merely employed by the "business" (GBC) which ultimately filed for bankruptcy. Further, as evidenced by the FAC, Ms. Hill alleges that CARG Defendants "participat[ed] in a conspiracy to shut down Robin Hill's family business, Groth Bros. Chevrolet" and "participat[ed] in a conspiracy to defraud Robin Hill out of the real property that she and her family had just purchased" -- property that was pledged as security for GBC's payment of corporate debts. (FAC, ¶191.) Again, these alleged activities are clearly insufficient to support the claim, as they are directed at GBC, not at Ms. Hill.

Notwithstanding, Ms. Hill next seizes on an exception to the general rule articulated in *Christensen*: "when the defendant is aware of, but acts with reckless disregard of the plaintiff and the probability that his conduct will cause severe emotional distress," a claim of IIED may proceed even if the conduct is not "directed" at plaintiff. *Id.*, at 905. In an effort to invoke this exception, Ms. Hill thinly argues that Dosanjh's offensive statement and the vast alleged "conspiracy" perpetrated by Defendants were "reckless acts" and thus, even if directed at GBC, trigger the exception.

This argument fails for multiple reasons. As plainly stated in *Christensen*, the general rule is afforded great deference by the Courts, and by leading minds on the subject: "These authors acknowledge the problems associated with permitting recovery for action that is not directed at the plaintiff or undertaken with knowledge of the likelihood of harm to the plaintiff, noting the doctrine of transferred intent is inappropriate in this conduct…" and that in the context of "reckless conduct" (as opposed to directed conduct), while cases have proceeded, they generally relate to "funeral-related services." *Id.*, at 905. Conspicuously, Ms. Hill fails to cite to any legal authority supporting her argument that indirect "reckless conduct" resulting in a plaintiffs' derivative economic harm (such as she suffered) falls within the ambit of the "reckless conduct" exception. Indeed, Ms. Hill's Opposition fails to cite to any cases at all, except *Christensen*, and only then, to quote the exception. Moreover, with respect to the exception, a plaintiff seeking to invoke it must establish that she was present "at the time the outrageous conduct occurs…." *Id.*, at 906. Here, the FAC is devoid of facts alleging that Ms. Hill witnessed or heard Dosanjh make the alleged offending statement, which further erodes the viability of the claim.

Next, Ms. Hill punts on the issue of "outrageousness" merely arguing that because "reasonable persons may differ" as to whether conduct is outrageous, it becomes a question of fact for a jury, thereby precluding a ruling at the pleading stage. This is an apparent substitute for citable case law supporting her characterization that the conduct alleged in the FAC can legally be considered "outrageous."

Finally, while Ms. Hill concludes that her "embarrassment and humiliation…satisfies the 'severe emotional distress' standard" she fails to address the glaring deficiency in her claim: the FAC is bereft of allegations establishing "the nature or extent of any mental suffering incurred as a result of [defendants'] alleged outrageous conduct." *Bogard v. Employers Casualty Co.*, 164 Cal.App.3d 602, 616, 617-618 (1985). In the absence of such allegations, a court has the discretion to dismiss the claim at the pleading stage. *Id.*; see also *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal.App.3d 376, 397 (1970) ("[i]t is for *the court* to determine whether on the evidence severe emotional distress can be found".) (internal quotation and citation omitted; emphasis supplied).

D. Plaintiffs' Unfair Business Practices Cause Of Action Fails To State A Claim

Because Plaintiffs' unfair business practices claim is predicated exclusively on their RICO claim. To the extent the Court agrees that the RICO claim fails, so too does this claim. From a substantive perspective, the claim fares no better, and fails to articulate an appropriate basis for the requested injunction. As argued in their moving papers, CARG Defendants contend that Plaintiffs cannot seek injunctive relief for past harm; only recurring future harm. *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1123 (9th Cir. 1999), *abrogated on other grounds as recognized in Warner Bros. Entm't Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1012 n.8 (C.D. Cal. 2011) (Under the UCL, "a plaintiff cannot receive an injunction for past conduct unless he shows that the conduct will probably recur"); *Madrid v. Perot Sys. Corp.*, 130 Cal. App. 4th 440, 463 (2005) ("Injunctive relief is appropriate only when there is a threat of continuing misconduct."). Here, the FAC only addresses harm to Plaintiffs (both Groth and Crown Plaintiffs) occurring years ago (in the case of Crown -- 5 years ago). There are no allegations -- and Plaintiffs cite to none in the FAC -- establishing that recurring harm is likely to occur.

Rather, Plaintiffs point to their allegation of a "larger scheme to gain control of the San Francisco East Bay Marketplace" (Opposition, at 35:17-21), and claim because the marketplace consists of numerous dealerships across "hundreds of miles…there is certainly a risk that Defendants' fraudulent activity could continue." (Opposition, at 35:24-26.) Again, Plaintiffs cite to no law supporting the proposition that a "risk" satisfies the "probable recurrence" standard enunciated by the Ninth Circuit in *Sun Microsystems*.

E. The Groth Plaintiffs Fail to Plead a Claim Under the Fifth, Sixth, Seventh, Eighth, and Ninth Causes of Action Against Dosanjh Individually, Because His Alleged Actions Were Taken on Behalf of His Employer, CARG

In response to Dosanjh's argument that he should not be held individually responsible for the alleged actions of CARG, Plaintiffs cite to a variety of cases holding that an officer or director of a corporation who "specifically authorized, directed or participated in the allegedly tortious conduct" may be deemed individually liable. (Opposition, at 36:5-22.)

The failure in Plaintiffs' Opposition, however, is identifying the core allegations that Dosanjh, in fact, participated in or directed tortious conduct. Plaintiffs, in rote fashion, tick off the same allegations from the FAC in an effort to show the "individualized" efforts of Dosanjh. However, as pled, Dosanjh's only involvement appears to be in connection with a "larger conspiracy" to drive GBC out of business. Accordingly, Dosanjh's role in that alleged conspiracy is through his involvement with CARG. Indeed, as argued in Plaintiffs' Opposition, "Dosanjh controlled the operations of CARG." (Opposition, at 36:27-28.)

As asserted in CARG Defendants' moving papers, under California law, "'[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage.'" *Black v. Bank of America*, 30 Cal.App.4th 1, 4 (1994) (quoting *Wise v. Southern Pacific Co.*, 223 Cal.App.2d 50, 72 (1963).) Plaintiffs cite to no law that undermines this general rule. They further cite to no allegations in the FAC establishing that Dosanjh acted outside of his "official capacity" and in fact allege the opposite: "At all times relevant hereto, Inder Dosanjh controlled the business operations of Defendant California Automotive Retailing

Group, Inc." (FAC, ¶10.) In the absence of such allegations, there is no viable basis on which to hold Dosanjh individually liable for the Fifth, Sixth, Seventh, Eighth or Ninth Causes of Action.

II. CONCLUSION

For the reasons set forth above, in CARG Defendants' moving papers, and in the parallel motions to dismiss filed by Defendants GM and Ally (which CARG Defendants join), CARG Defendants respectfully request that the Court grant this motion and dismiss the Fifth, Sixth, Seventh, Eighth or Ninth Causes of Action alleged against them without leave to amend.

Dated: May 6, 2013 FITZGERALD ABBOTT & BEARDSLEY LLP

By /s/ David C. Lee
David C. Lee
Attorneys for Defendants Inder Dosanjh and California Automotive Retailing Group, Inc.